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No. 05-746

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Writ of Certiorari to the Missouri Court of Appeals

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

Missouri is the only jurisdiction in the United States that instructs juries to apply a different and more stringent standard of causation to contributory negligence than to railroad negligence under the Federal Employers' Liability Act (FELA). Missouri is both stubborn and wrong. Nothing in the statutory language supports its rule. The long-established rule of the common law (and of admiralty and comparative negligence schemes) both in 1908 and today is that defendant negligence and contributory negligence are measured by the same standard: proximate cause. In any event, divergent causation standards are irreconcilable with the comparative negligence scheme of FELA, and the Missouri asymmetry must be rejected no matter whether proximate or slightest cause is the proper standard. Respondent has no answer for any of these points, and his contention that the writ should be dismissed – because purportedly this Court cannot decide what causation standard governs railroad negligence – has no substance.

I. THE MISSOURI RULE OF DIVERGENT CAUSATION STANDARDS SHOULD BE REJECTED.

1. Respondent begins by urging this Court to dismiss the writ as improvidently granted, signaling an inability to defend the Missouri rule on the merits. Indeed, his argument for dismissal of the writ is an exercise in confusion, directed not at the question presented, but at one set of arguments that Norfolk Southern ("NS") has made in favor of reversal.

The sum and substance of respondent's argument for dismissal of the writ is that NS waived "any challenge to the instruction on railroad negligence" by not objecting below to that instruction. Resp. Br. 1. This argument wholly misses the mark. That argument would only be relevant if NS had asked this Court to review its *liability*, and if the railroad had not objected to the instruction resulting in that liability and the Missouri Court of Appeals had not passed on the issue. But NS has sought review of the judgment for instructional error in the *apportionment of damages*, on the grounds that

FELA does not require a higher showing of causation for contributory than for railroad negligence. Pet. (i), 12-15.

Respondent does not dispute that this Court has jurisdiction over the question presented. The question presented in the petition is "[w]hether the court below erred in determining ... that the causation standard for employee *contributory negligence* under the Federal Employers Liability Act ("FELA") differs from the causation standard for railroad *negligence*." Pet. (i). This Court will exercise jurisdiction to decide a federal question pressed *or* passed on in the state court below. *Illinois* v. *Gates*, 462 U.S. 213, 217-24 (1983) (declining to decide whether that rule is prudential or jurisdictional). Here, the question presented was both pressed and passed on below. NS argued below that the causation standards for railroad and contributory negligence should be the same and asked that the same causation instruction based on the "whole or in part" language of section 1 of FELA be given for both railroad and employee negligence. See J.A. 9-10; Pet. App. 28a-29a (arguing that MAI 32.07 on contributory negligence "misstates the law because that is a different standard" which requires the defendant's proof to meet "a much more exacting standard" than the instruction on railroad negligence). NS renewed this issue in the court below, and the Missouri Court of Appeals decided that issue adversely:

> Norfolk contends that in a FELA case where contributory negligence is an issue, the causation standard should be the same as to the plaintiff and the defendant. However, Rule 70.02 provides that whenever "Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any instructions on the same subject." Here, the instruction patterned after MAI 32.07(B) was the correct instruction. MAI 32.07(B) has been determined to be the applicable instruction in cases such as the present case. Thus we cannot convict the

> trial court of error in giving the applicable MAI as determined by the Supreme Court of Missouri.

Pet. App. 7a.

Respondent instead makes the novel argument that even if the question presented was both pressed and passed on below, this Court should not decide that issue because NS has also asked this Court to clarify the legal standard of causation for railroad negligence in the process of correcting the obvious legal error. Resp. Br. 13-18. This contention has no force. This Court always has discretion to decide "a question anterior to" the question presented, *Ballard* v. *Commissioner*, 544 U.S. 40, 47 n.2 (2005), regardless of what the parties argued below (or even in this Court).[1] There can be no doubt that the causation standard for railroad negligence is anterior to the question of whether FELA permits divergent causation standards for railroad and contributory negligence, and thus within the Court's province to decide. But even if this Court were inclined to decide only the precise question presented, the answer is to save the proximate cause issue for another day.[2] The Court still needs to eliminate Missouri's plain mis-

[1] This Court may reach any issue "so connected with [the question presented] in substance as to form but another ground or reason for alleging the invalidity of the lower court's judgment." *Illinois* v. *Gates*, 462 U.S. 213, 220 (1983) (alteration and internal quotation marks omitted). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); *see also Rumsfeld* v. *Forum for Academic & Inst'l Rights, Inc.*, 126 S. Ct. 1297, 1304 (2006) ("granting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says," and the Court need not "accept an interpretation of a statute simply because it is agreed to by the parties"). Furthermore, respondent's objection to the consideration of the causation standard for railroad negligence is both unfounded and waived. *Infra* part II.

[2] *See Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977) ("We leave open for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard, and note here only that it is narrower than the standard set forth in dicta in *Fay* v. *Noia*, 372 U.S. 391 (1963) .... "); *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 631-32 (2001) (deciding case as it

reading of FELA. The question of divergent standards is of substantial importance and is the basis of a circuit conflict, Pet. 12-15; even if *arguendo* Congress did intend to eliminate proximate cause, there is no warrant for the aberrant Missouri rule that is irreconcilable with a comparative negligence scheme, and stacks the deck against railroads.

Respondent can conjure no reason why this Court cannot decide the question on this limited basis, so he makes the false statement that NS has "abandoned" the position that equivalent causation standards are necessary under the "slightest cause" rule. Resp. Br. 2. NS has abandoned nothing. It has consistently argued in the alternative, both at the petition and the merits stage, that FELA does not permit divergent causation standards for railroad and contributory negligence, even if the proper standard for the former is "slightest cause." Pet. 14-15; Pet. Reply Br. 8; Petr. Br. 49-50 ("Alternatively, if this Court were to rule that 'slightest cause' is the standard that a jury should apply to railroad negligence, there is no basis for maintaining divergent standards, and that same standard must be applied to claims of employee contributory negligence as well. *Page* v. *St. Louis Sw. Ry.*, 349 F.2d 820, 823 (5th Cir. 1965).").[3]

"comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim"); *see also BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 537 (2002); *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 829 (1995); *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 423 (1990); *Schacht* v. *United States*, 398 U.S. 58, 62 (1970).

[3] Finally, it is hard to fathom the contention that this Court would render an advisory opinion if it decided this case. If this Court rules that the same standard of proximate cause applies to both contributory negligence and railroad negligence, NS is entitled to a new trial because MAI 32.07 added a "directly" requirement to the statutory language to connote proximate cause for contributory negligence only, misleading the jury by requiring a more stringent level of proof. If the Court agrees with respondent that the standard for railroad negligence is "slightest cause," but agrees with NS that the same standard must apply to comparative negligence, NS would likewise be entitled to a new trial because it did not receive an equivalent instruction for contributory negligence. If the Court leaves open the question of the content of the standard, but simply holds

2. On the merits, respondent is unable to defend the Missouri rule. Respondent argues that FELA enacts a bizarre comparative negligence scheme that imposes different causation standards on plaintiffs and defendants. In so doing, he forsakes any analysis of the statute, the common law, and this Court's longstanding FELA precedents. He stakes his entire position on the untenable claim that *Rogers* v. *Missouri Pacific Railway*, 352 U.S. 500 (1957), overruled a half-century of this Court's precedents (despite his vehemence that the Court not decide the point) and on "that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes." *Director, OWCP* v. *Newport News Shipbldg. & Dry Dock Co.*, 514 U.S. 122, 135 (1995).

Tellingly, respondent finds no support in the statutory language of FELA for a scheme of divergent causation standards. Indeed, he steadfastly ignores the longstanding rule that Congress is not deemed to have departed from the common law in FELA unless it did so expressly. *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 145 (2003); *Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 337-38 (1988).

NS has demonstrated that the rule at common law in 1908 was (and today still is) that the same causation standards apply to both defendant and contributory negligence. Petr. Br. 12-14. Respondent makes no effort to dispute this. Thus, in order to show that FELA departed from this common law rule, respondent must point to an explicit alteration of that

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that FELA requires equivalence, then for the same reasons, the trial court on remand would grant a new trial. Moreover, because the error on review pertains to apportioning damages, it will be necessary on remand to grant a full new trial, since "the question of damages ... is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Gasoline Prods. Co.* v. *Champlin Ref. Co.*, 283 U.S. 494, 500 (1931). Obviously, the court on remand would benefit from direction from this Court concerning the proper meaning of causation under FELA.

rule in the statute. He cannot do so.

Not only is there no express departure, but there also is no basis for imputing to Congress an intent to depart from the common law rule of equivalence. Congress looked to both emerging comparative negligence schemes and admiralty in fashioning FELA; under each of those legal regimes in 1908, the same causation standard applied to both defendant and plaintiff negligence. *Id.* at 14-17. Nor can respondent find support in the current common law. Under modern common law (as well as admiralty and comparative negligence systems), once again the same standard of causation applies to both plaintiff and defendant negligence. *Id.* at 19-21.

Divergent causation standards are also inimical to the operation of the FELA comparative negligence scheme. Congress directed that contributory negligence shall not bar a recovery, but that the damages shall be diminished by the jury "in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. This provision requires a jury to determine the total "causal negligence," and divide damages according to the respective shares of the total negligence attributable to the railroad and to the employee. *Seaboard Air Line Ry.* v. *Tilghman*, 237 U.S. 499, 501 (1915). The intent is that the railroad would "'be responsible to the extent to which it was to blame, and the plaintiff would be responsible himself to the extent to which he was to blame.'" *Illinois Cent. R.R.* v. *Skaggs*, 240 U.S. 66, 73 (1916). Thus, under FELA, damages are apportioned according to relative negligence, not relative causal contribution.

Respondent diverts the Court's attention to a few state-law schemes allowing comparison among parties liable for different kinds of *fault*. Resp. Br. 43-46.[4] But in FELA the only

[4] Even as to these few schemes, respondent fails to support his claim that there are material differences in causation standards. Although intentional acts may alter the causation analysis, *Rodopoulos* v. *Sam Piki Enter., Inc.*, 570 So. 2d 661, 665 (Ala. 1990) (a broader range of harms are considered proximately caused by intentional torts), causation that is a substantial factor in the injury, whether denominated legal or proximate

kind of fault that is compared is the *negligence* of the railroad and employee. 45 U.S.C. § 53. There is no system anywhere in the law that subjects the negligence of plaintiff and defendant to different causation standards in determining responsibility for a single injury, and it would be particularly anomalous to adopt such a rule when the entire purpose of FELA is to divide damages according to relative negligence. Congress did not fashion a novel scheme of divergent causation standards that will, in a fair number of cases, prevent the just apportionment of damages on the basis of relative negligence, especially one that would come at the price of confusing a jury with the application of different causation standards to the same injury. Petr. Br. 47-48. Even if *arguendo* the Missouri rule were not wholly unworkable, the traditional rule of equivalent causation standards is far more consonant with the congressional purpose to make "each party responsible for his own negligence, and require[] each to bear the burden thereof." H.R. Rep. No. 60-1386, at 1 (1908).

At the end of the day, respondent resorts to the putative broad purposes of the Act to maximize plaintiff recovery, arguing that FELA should be interpreted to function like a worker's compensation statute (albeit with full recovery of tort damages). Resp. Br. 3, 22-23. But Congress rejected the European worker's compensation models in favor of the emerging comparative negligence models of the states, retaining common-law rules except insofar as it expressly departed therefrom. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994); Petr. Br. 15-17. This Court has disapproved

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cause, is required for all actions for damages in tort. *Restatement (Second) of Torts* § 9 (1965); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 43 (5th ed. 1984); *Posen* v. *Sitecon LLC*, No. 86239, 2006 WL 1774131, at *4 (Ohio Ct. App. June 22, 2006) ("'It is not sufficient to demonstrate that injury was substantially certain to occur,'" for "[c]ourts continue to require a plaintiff in an intentional tort case to establish the proximate cause of his injuries"). Respondent (Br. 44) also implies that products liability or other forms of strict liability dispense with proximate cause. That is not true. *Prosser & Keeton*, *supra*, § 103; *Thompson* v. *Hirano Tecseed Co.*, 456 F.3d 805, 812 (8th Cir. 2006).

the view that FELA should be interpreted to maximize plaintiff recovery, *Morgan*, 486 U.S. at 337-39, and has found common-law rules of causation consistent with its liberal purposes, *Urie* v. *Thompson*, 337 U.S. 163, 195 n.34 (1949). The purpose of the statute was to eliminate contributory negligence as a bar to recovery, and instead make it a basis for apportioning damages. Congress did not seek to ensure maximum recoveries for employees who caused their own injuries in part through negligence; rather, Congress intended that such plaintiffs "*not* recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both." *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 122 (1913) (emphasis added). Respondent's rule would subvert the purposes of the Act. Thus, no matter what causation standard applies to railroad negligence, the standard for contributory negligence should be the same.

II. PROXIMATE CAUSE IS THE PROPER STANDARD FOR BOTH RAILROAD AND CONTRIBUTORY NEGLIGENCE.

This Court should also clarify that the Missouri rule is based on a false predicate: namely, that *Rogers* v. *Missouri Pacific Railway*, 352 U.S. 500 (1957), abrogated the long-standing FELA rule that a plaintiff must prove that railroad negligence is a contributory proximate cause of the injury. This misconception causes much mischief in FELA litigation, and contrary to respondent's claims this Court is free to decide this issue in resolving the question presented.

1. Respondent insists that even if the question presented were both pressed and passed on below, this Court is limited to deciding it on the grounds pressed or passed on below. Resp. Br. 13-18. As NS has already shown, that is not the law; in rendering judgment on the question presented, this Court is not constrained by the legal theories that a party advocated below (or even continues to advocate in this Court).

See *supra* n.1 (citing *Gates, Yee*, and *Rumsfeld*).[5] Respondent's complaint that NS has "taken a wholly inconsistent position," Resp. Br. 20, sounds in judicial estoppel, but respondent does not (and cannot) contend that estoppel applies. NS did not propose the instruction on railroad negligence, but simply did not challenge the binding MAI, Resp. Br. 6; it did not prevail below on either railroad or contributory negligence; and its position below did not prejudice respondent, who did prevail below on both issues. *See Zedner* v. *United States*, 126 S. Ct. 1976, 1987 (2006) (stating elements of judicial estoppel); *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001). Instead, respondent's unfounded rule of foreclosure would swallow the law of judicial estoppel.[6]

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[5] *See also Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995) (ruling in favor of petitioner on grounds "expressly disavowed" below and not argued until the brief on the merits); *City of Canton* v. *Harris*, 489 U.S. 378, 384 (1989) (ruling in favor of petitioner who had conceded the key legal question below); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 372 n.4 (1967) (ruling in favor of United States on changed theory), *overruled on other grounds*, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (deciding that exclusionary rule should apply to the States even though that issue was not presented below or in the parties' briefs).

[6] Regardless, even the unfounded rule respondent advocates would not avail his cause. NS admittedly did not challenge in state court the long-standing decisions of the Missouri Supreme Court interpreting *Rogers* to reject proximate cause as the standard for railroad negligence, *Ricketts* v. *Kansas City Stock Yards Co. of Me.*, 484 S.W.2d 216, 221-22 (1972) (en banc), and Missouri counsel did not make what (in light of those precedents) would have been a futile objection at trial to the MAI verdict-director instruction on railroad negligence. But although the proximate-cause argument was not *pressed* by NS below, it was *passed on* below: the Missouri Court of Appeals held that the proximate cause standard embodied in MAI 32.07, *Leake* v. *Burlington N. R.R.*, 892 S.W.2d 359, 365 (Mo. Ct. App. 1995), applied to contributory negligence claims even though not to railroad negligence claims. Pet. App. 6a-7a. *See Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (even where issue of causation not pressed, the court below addressed entitlement to relief, and thereby passed on causation); *United States* v. *Wells*, 519 U.S. 482, 488 (1997) (waiver rules of lower courts do not bind this Court).

In any event, it is too late in the day for respondent to raise these objections because he did not raise them in his brief in opposition to the petition for certiorari. After falsely stating that the petition nowhere raises the issue, (Resp. Br. 1), respondent grudgingly acknowledges (*id.* at 19) that NS specifically argued in its petition – in the text, not in a footnote, and with accompanying citation – that "[t]he predicate rule in Missouri that FELA eliminates the proximate cause requirement for railroad negligence is contrary to federal law, see *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923); *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944)." Pet. 14-15. Respondent claims that he has no obligation to object to legal positions that are not expansively argued in the petition. Resp. Br. 19. Rule 15.2 is to the contrary. It requires counsel to object "in the brief in opposition, and not later," to "*any* perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2 (emphasis added); *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). If omitted from the opposition, "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived." Sup. Ct. R. 15.2.

Thus, this Court has admonished that it "will not dismiss the writ as improvidently granted" when an objection that an issue was not pressed below is not stated in the brief in opposition, for "'[t]he decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits ... of the question presented.'" *Canton*, 489 U.S. at 384 (1989) (omission in original). Here, this Court decided to grant plenary argument rather than the summary reversal that NS requested in the alternative. Pet. 15-20. In so doing, this Court clearly understood that, in resolving the question presented of whether the FELA causation standards for railroad and contributory negligence differ, the content of those stan-

dards would be placed in issue. Indeed, respondent's central contention in his brief in opposition was that "in *Rogers*, the Court held that FELA section 51 explicitly abrogates the employer's traditional common-law causation standard," but that "neither the purpose nor plain language of FELA section 53 demands the same conclusion for the employee's contributory negligence." Opp. 5. Respondent further asked this Court to discount the earlier precedents on which NS relied because "they were all decided before *Rogers* definitively established that the defendant's causation standard was not the traditional common-law measure, but rather the relaxed 'in whole or in part' causation standard." *Id.* at 6. The issue of the proper causation standard for railroad negligence was clearly joined in the petition-stage briefs. See also Pet. Reply 5-8 (rebutting these arguments).

There is no prudential reason for this Court not to give the question presented plenary treatment, and to decide an anterior question that is fully and exhaustively briefed by both sides. *Vance* v. *Terrazas*, 444 U.S. 252, 258-60 & n.5 (1980) (deciding whether a statute requires proof of specific intent to renounce U.S. citizenship, despite Government's change in position, because "the issue of intent is important, the parties have briefed it, and we shall address it"). The causation standard for railroad negligence is a recurring and important pure issue of federal law. *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980).[7] Finally, the defining question of whether *Rogers* overruled a series of this Court's precedents is one that can only be resolved by this Court, and there is no conceivable

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[7] NS and its affiliated companies have twice asked this Court in recent years to clarify the scope of *Rogers* and resolve the question of the proper causation standard for railroad negligence. *Consolidated Rail Corp.* v. *Richards*, 540 U.S. 1096 (2003); *Norfolk S. Ry.* v. *Schumpert*, 126 S. Ct. 663 (2005). Contrary to respondent's assertion, Resp. Br. 21 & n.14, NS took the exact same position on causation in *Ayers*, 538 U.S. 135, that it does today. *See Ayers* Reply Br., at 18 ("The longstanding rule of causation under FELA before and after [*Rogers* and other decisions] is proximate cause") (discussing authorities).

benefit from awaiting further percolation in the circuits (given that almost every circuit has resolved the issue one way or the other and is unlikely to change its rule).

2. Respondent's position that *Rogers* abrogated the rule of contributory proximate cause is indefensible.

> The FELA "abolished the fellow servant rule"; "rejected the doctrine of contributory negligence in favor of comparative negligence"; "prohibited employers from exempting themselves from the FELA through contract"; and, in a 1939 amendment, "abolished the assumption of risk defense." [*Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 542-43 (1994)]; see 45 U. S. C. §§ 51-55. "Only to the extent of these explicit statutory alterations," however, "is the FELA 'an avowed departure from the rules of the common law,'"

Ayers, 538 U.S. at 145 (ellipsis and brackets omitted).

Respondent cannot point to any express statutory departure from the common law rule of proximate cause. This is with good reason: As NS has demonstrated, FELA's authorization of recovery if the injury or death "result[ed] in whole or in part from the [railroad's] negligence," 45 U.S.C. § 51, is not a departure from the common law, but *is and was* the common-law rule under prevailing conceptions of proximate cause for both defendant and contributory negligence. Petr. Br. 29-33. Respondent does not dispute the many cases and authorities NS cites for that proposition. Instead, he offers the weak and circular rejoinder that the pre-1908 cases NS cites "neither interpret that language in a statutory context nor consider whether the phrase bears on the applicable causation standard." Resp. Br. 24 n.17. That is precisely the point; those cases establish the common-law rule that is presumed to have been adopted in FELA absent an express departure.

Not only was "in whole or in part" the prevailing common-law rule, but this Court has long interpreted this statutory language to incorporate proximate cause: the plaintiff must prove that "negligence was *the proximate cause in whole or in part*"

of the employee's injury. *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944) (emphasis added). Respondent suggests that the many pre-*Rogers* cases on proximate cause should be discounted because (1) before *Rogers* this Court supposedly never had the "opportunity to address the appropriate causation standard for railroad negligence" and the term was never "essential to [the] decision," Resp. Br. 34, and (2) the 1939 Amendments supposedly "clarif[ied]" that proximate cause is not the rule, *id.* at 23 & n.15. Both statements are demonstrably false.

As to the first, the rule of proximate cause was essential to a number of this Court's decisions granting judgment as a matter of law to defendants for lack of proof of proximate cause. *Lang* v. *New York Cent. R.R.*, 255 U.S. 455, 461 (1921); *St. Louis-S. F. Ry.* v. *Mills*, 271 U.S. 344, 347 (1926); *Northwestern Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934). Moreover, in at least two cases prominently featured in NS's brief (Br. 27-28), yet not distinguished or even cited by respondent, this Court explicated the content of that standard in detail. *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923); *Brady* v. *Southern Ry.*, 320 U.S. 476, 483 (1943) (adopting the proximate-cause rule of *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U.S. 469, 475 (1876)). More fundamentally, no concept of "proximate cause" can be reconciled with respondent's "slightest cause" concept, which is a rule of but-for causation. Petr. Br. 45-47.

Respondent's claim that the 1939 Amendments clarified that FELA abolished proximate cause is even more farfetched. Those amendments did not modify FELA's negligence or contributory negligence provisions, and indeed did no more than restate the statutory language of section 1 in the new provision abolishing the defense of assumption of the risk where the employee's "injury or death resulted in whole or in part" from the railroad's negligence. 45 U.S.C. § 54. By simply restating the statutory language from section 1, Congress is presumed to have accepted this Court's then ex-

isting gloss on the term (*i.e.*, that it required proximate cause). *Cannon* v. *University of Chi.*, 441 U.S. 677, 698-99 (1979). Because section 1 already connoted proximate cause, the railway union general counsel advised the House committee that it would only add confusion to use different language referring to proximate cause in the amendment. Petr. Br. 33. It is always hazardous to interpret a statute based on the claimed interpretation of a later Congress, *United States* v. *Price*, 361 U.S. 304, 313 (1960), but respondent's imputation that Congress overrode prior interpretations of statutory language by simply restating that language in a new provision is groundless. Regardless, this Court has declared after the 1939 amendments that the jury must still decide whether the carrier's "negligence was the proximate cause of the injury." *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 67 (1943).

Respondent thus cannot prevail unless *Rogers* silently overruled the 20-odd cases in which this Court had recognized proximate cause as the proper standard under FELA. As an initial matter, there is a heavy presumption against respondent's reading of *Rogers*, given the special force of *stare decisis* in statutory cases, Petr. Br. 40, and given that "this Court does not normally overturn, or ... dramatically limit, earlier authority *sub silentio*." *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2003).

NS has shown that *Rogers* did not overrule any of this Court's proximate cause cases, and simply states the test of a jury case when the evidence would permit a jury to find that railroad negligence is one among multiple possible proximate causes of the injury. Petr. Br. 34-42. Even though the jury instruction given in *Rogers* was not contested before or disapproved by this Court, respondent seeks to convert *Rogers* into a holding that forbids juries to be given a proximate-cause instruction. Respondent claims that *Rogers* "definitively" held that FELA does not "require[] proof of proximate causation for a railroad to be liable," Resp. Br. 26-27, but he reaches that conclusion by ignoring what this Court said.

Rogers held that the state court erred in requiring the jury to "exclude the idea that [the employee's] injury was due to causes with which the defendant was not connected," 352 U.S. at 505-06, based on "*language of proximate causation* which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the *sole, efficient, producing cause* of injury." *Id.* at 506 (emphasis added). In *Rogers*, Missouri's antiquated common-law concept of "sole" proximate cause was contrary to the statutory rule rendering railroads liable for injuries resulting "in whole or in part" from railroad negligence, 45 U.S.C. § 51, and to this Court's longstanding rule of "contributory proximate cause," *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 523 (1949); *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 435 (1949). See *Rogers*, 352 U.S. at 506-07 & nn.11, 13, 14 (relying on proximate-cause cases, Petr. Br. 37-39). Respondent's position – that *Rogers* abrogated the "contributory proximate cause" rule under FELA by relying on precedents enforcing that rule and rejecting a contrary state common-law rule of sole proximate cause – makes no sense.

Respondent claims support from the following statement in *Rogers* (which he quotes selectively, Resp. Br. 26):

> The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases.

Rogers, 352 U.S. at 509-10. But the "misconception evidenced in the opinion below," as the Court had just discussed, is that a railroad is only liable if the evidence shows that the railroad's negligence was the sole proximate cause, and excludes any possible finding that the injury "was due to causes with which the defendant was not connected," such as the employee's contributory negligence. *Id.* at 505-06. In a traditional common law action where contributory negligence

was at issue, that would have been the rule: if the defendant's negligence and the plaintiff's negligence both proximately caused the injury, then the defendant was not liable, because contributory negligence was an absolute defense. *See, e.g.*, *McCrowell* v. *Southern Ry.*, 20 S.E.2d 352, 357 (N.C. 1942) (under the common law, "the proximate contributory negligence of the plaintiff, however small the contribution, will bar recovery, and justify the withdrawal of the case from the jury under the single inference rule when the evidence warrants it"); *Curlee* v. *Southern Ry.*, 115 S.E. 628, 630 (S.C. 1923) (same). But a FELA action is significantly different because it abolishes the absolute defense and makes contributory negligence a rule in mitigation of damages, thus making the railroad liable if its negligence causes the injury "in part" even if the employee also contributes in part to the injury. *Rogers*, 352 U.S. at 505-08 & n.12 (quoting 45 U.S.C. § 53, the contributory negligence provision). Congress intended for juries (not courts) to make the determination of whether the employer's negligence played any part in the injury, *id.* at 509-10, and thus the *Rogers* Court "reach[ed] the same conclusion in this case" as it had "[i]n a relatively large percentage of ... cases" that the lower courts had erred in taking away the question of the railroad's liability from the jury. *Id. Rogers* was a case about sufficiency of the evidence under established federal standards; it did not announce a sea change in FELA law by abolishing the settled understanding of proximate cause.

Respondent also misplaces reliance on another passage from *Rogers*, which again he selectively quotes (Br. 26):

> The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.

Rogers, 352 U.S. at 508-09. But respondent ignores the case

that *Rogers* cites in the accompanying footnote 16 to support that proposition: *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943). The quoted sentence from *Rogers* is a paraphrase of the following statement from *Tiller*:

> The Act of 1908 and the amendment of 1939 abolish the [assumption of the risk] ... defenses and authorize comparison of negligence instead of barring the employee from all recovery because of contributory negligence. They leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the *proximate cause* of the injury.

Id. at 67 (emphasis added). *Rogers* simply applied that rule to the case where, as it had already determined, the jury had a choice of finding that either railroad or employee negligence proximately caused the injury, 352 U.S. at 503-04; the case could not be taken away from the jury so long as there was evidence from which it could find that the "negligence of the employer played any part, however small, in the injury." *Id.* at 508. This was the established rule in FELA cases – the railroad was liable if its negligence was *a* proximate cause, no matter how slight its contribution relative to other causes – a point that respondent does not contest. Petr. Br. 38-39 (citing cases). *Rogers* broke no new ground, and there is no basis for claiming that it abrogated the settled proximate cause rule.[8]

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[8] It is passing strange that respondent (Br. 35-36) endorses *Egslaer* v. *Scandrett*, 151 F.2d 562 (7th Cir. 1945), as the proper statement of FELA causation. *Egslaer* states exactly the rule that NS says that *Rogers* adopts: namely, that FELA dispenses with "the old concept of proximate cause" as the "direct, *the complete*, the responsible, the efficient cause of the injury," to the exclusion of "[c]ontributing" causes. *Id.* at 565-66 (emphasis added). This is also exactly what the petitioner argued in *Rogers*: vindication of the federal rule of contributory proximate cause, Brief for Petitioner at 4, 9, 19, 24-26, *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) (No. 28), and rejection of Missouri's "old concept of proximate cause," wherein "th[e] cause must have been direct, *the complete*, the responsible, the efficient cause of the injury," *id.* at 25 (emphasis added). Respondent claims that the losing party's rehearing petition supplies the proper gloss on *Rogers*, Resp. Br. 32-33, but the natural inference is that

Respondent fails in his attempt (Br. 27-28) to argue that later cases of this Court embrace his reading of *Rogers* as abrogating proximate cause as the substantive rule on which the jury should be instructed. *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108 (1963), favors NS. In that case, the jury had been instructed it must find proximate cause, and rendered a special verdict "that the injuries to the plaintiff [were] proximately caused by the acts or omissions of the defendant.'" *Id.* at 111 (ellipses omitted). This Court reversed the lower court's grant of a judgment as a matter of law to the defendant, applying the test for the review of sufficiency of the evidence of proximate causation in *Tennant*, which leaves to the jury the resolution of conflicting inferences of causation. *Id.* at 114-15. Importantly, this Court characterized *Rogers* as one of the "[l]ater Federal Employers' Liability Act cases involving sufficiency of the evidence on causation where several explanations are plausible [that] follow the teaching of the *Tennant* case" (*i.e.*, that plausible inferences of proximate cause are for the jury). *Id.* at 115-16. In *Gallick*, there were several competing possible causes of the insect infestation resulting in injury that were unconnected to the railroad (including pollution of the Cuyahoga River by others and "'unsanitary places situated on property not owned or controlled by the railroad,'" *id.* at 112). This Court upheld the jury verdict because the "'the *test of a jury case* is simply whether the proofs justify with reason the conclusion that employer negligence played any part in producing the injury'" even if "'from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes.'" *Id.* at 116-17 (emphasis added and ellipses omitted) (quoting *Rogers*, 352 U.S. at 506-07).[9]

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this Court denied rehearing because its opinion was fully consistent with its proximate-cause precedents.

[9] *Dennis* v. *Denver & Rio Grande W. R.R.*, 375 U.S. 208 (1963) (per curiam), likewise finds sufficiency of the evidence under *Rogers* to support the jury's verdict (pursuant to a proper instruction) that railroad negligence was a proximate cause of the injury, even though "[t]here was also

Just as *Gallick* reaffirmed the *Tennant* proximate-cause holding after *Rogers*, this Court one year after *Rogers* reaffirmed and applied the *Davis* rule that an employer could be liable for a violation of a statutory duty that is "'the proximate cause of the accident'" in a case under the Jones Act (which incorporates FELA). *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 434 (1958) (quoting *Davis*, 263 U.S. at 243). Contrary to respondent's claim (Br. 28-29), this is *Kernan*'s holding, not dicta. The Court held that not only *Davis* but also five other proximate cause precedents stated the rule under FELA and thus under the Jones Act. *Kernan*, 355 U.S. at 432-39 (citing *Coray*, 335 U.S. 520; *Swinson* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935) (statute "has been liberally construed so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the act")); *Urie*, 337 U.S. at 195 (same); *Louisville & Nashville R.R.* v. *Layton*, 243 U.S. 617, 621 (1917) (same); *Minneapolis & St. L. R.R.* v. *Gotschall*, 244 U.S. 66 (1917)). In reversing the judgment, this Court held that "the principles governing those cases clearly should apply here." *Kernan*, 355 U.S. at 439.[10]

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evidence from which the jury could reasonably have concluded that petitioner's own negligence was the sole cause of his injury." *Id.* at 210; *cf. id.* at 211 n.* (Douglas, J., dissenting) (quoting proximate cause instruction). *Inman* v. *Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959), is a case about the sufficiency of the evidence of *negligence*, not causation, and simply states the *Rogers* rule consistently with the reading above. Respondent quotes two other cases that refer in passing dicta to a relaxed standard of causation under FELA; those statements are true in that *Rogers* discarded a restrictive common-law concept of sole proximate cause operative in some States, but regardless such dicta could not overrule repeated holdings of this Court that proximate cause is the FELA standard. Petr. Br. 41 n.20.

[10] Respondent's claim (Br. 29-31) that this Court should give *stare decisis* effect to the decisions of the courts of appeals that agree with his reading of *Rogers* is rich with irony, given that he wishes to deny *stare decisis* to this Court's many proximate-cause precedents. Regardless, the premise of respondent's argument is false. The lower courts have not "uniformly recognized" (Resp. Br. 29) that *Rogers* abrogates proximate

There is thus no basis for reading *Rogers* to abrogate this Court's proximate-cause precedents (which were more contemporaneous with the enactment of FELA). Even if, contrary to fact, there were some tension, *Rogers* does not govern simply if it is later in time than certain contrary precedents; this Court must decide which of its precedents is faithful to the statute. *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 276-78 (1994); *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 695 (1978).[11] The proper reading of FELA is that a railroad may be held liable for negligence that is a contributory proximate cause of injury, and the same standard applies to contributory negligence in apportioning damages.

CONCLUSION

The judgment should be reversed and the case remanded for a new trial.

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cause; on the contrary, there is a deep conflict of authority on precisely that issue. While most courts of appeals have interpreted *Rogers* in the way Sorrell urges, *see* Pet. Reply 7 & n.4; Resp. Br. 29-31, at least six state supreme courts and the Third Circuit have held that FELA requires proximate cause, Pet. Reply 7 & n.3; *e.g.*, *Chapman* v. *Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) ("an employee must prove ... that the alleged negligence is a proximate cause of the employee's injury"); *Marazzato* v. *Burlington N. R.R.*, 817 P.2d 672, 674 (Mont. 1991) (same); *cf. Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424, 450 (1997) (Ginsburg, J., concurring in the judgment in part and dissenting in part) (agreeing with Third Circuit description of a FELA claim with "proximate cause" as one of its elements). Thus, there simply was no uniform rule for congressional silence to ratify, especially in light of contrary precedents of this Court that have never been overruled.

[11] Respondent (Br. 46-47) asks this Court to treat any instructional error as harmless, even though that question is factbound and governed by state law, *see* Mo. Sup. Ct. R. 84.13, and is at best an issue for remand. Regardless, respondent's theory that causal negligence of the driver is *per se* a proximate cause of injury is baseless. If, for instance, the jury found that Woodin drove at Sorrell but that Sorrell reacted improperly, the jury could have declined to find that Sorrell's negligence "directly contributed" to the injury, but may have instead concluded that his negligent positioning of the truck as the other truck approached was the "slightest" [*i.e.*, but-for] cause" of the injury under the standard respondent derives from *Rogers*.

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